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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

Petitioner,

against

THE THOMPSON CONSTRUCTION CORP. and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents,

and

BEN B. GREENE, INC.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING LEVINE,
Counsel for Petitioner,
501 Fifth Avenue,
New York 17, New York.

INDEX TO PETITION

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of Case and Disposition Below	3
Reasons for Granting the Writ	6
Conclusion	11
Appendix A—Judgment Below	12
Appendix B—Opinion Below	13
Proof of Service	27

CITATIONS

Cases:

Bowden v. United States for the use of Malloy, 239 F. 2d 572 (9th Cir., 1956), cert. den. 353 U.S. 957	6, 10
Brogan v. National Surety Co., 246 U.S. 257 (1918)	11
Coffee v. United States for use of Gordon, 157 F. 2d 968 (5th Cir., 1946)	10
Houston Fire & Casualty Insurance Company v. United States for the use and benefit of Trane Company, 217 F. 2d 727 (5th Cir., 1954)	10
Illinois Surety Co. v. John Davis Co., 244 U.S. 376 (1917)	11

Citations (continued).

PAGE

Mankin v. U. S. for use of Ludowici-Celadon Co., 215 U.S. 533 (1910) 7

McWaters and Bartlett v. U. S. for the use and benefit of Wilson, 272 F. 2d 291 (10th Cir., 1959) 9

Moyer v. U. S. for use of Trane Co., 206 F. 2d 57 (4th Cir., 1953) 7, 8

Old Dominion Iron and Steel Corp. v. Massachusetts Bonding and Insurance Company, 272 F. 2d 73 (3d Cir., 1959) 6

Sillman v. Twentieth Century Fox Film Corporation, 3 N.Y. 2d 395 (1957) 11

Standard Accident Insurance Company v. U. S. for the use and benefit of Powell, 302 U.S. 442 (1938) 10

St. Paul Mercury Indemnity Company v. U. S. for use of H. C. Jones, 238 F. 2d 917 (10th Cir., 1956) 7

United States for use of Birmingham Slag Co. v. Perry, 115 F. 2d 724 (5th Cir., 1940) 8, 11

U. S. for use and benefit of Hopper Bros. Quarries v. Peerless Casualty Company, 255 F. 2d 137 (8th Cir., 1958), cert. den. 358 U.S. 831 ..... 8, 10

U. S. A. for the use and benefit of J. A. Edwards & Co., Inc. v. Peter Reiss Construction Co. Inc., ——— F. 2d ——— (2d Cir., 1959) 12

Statute:

Miller Act, 49 Stat. 794 (1935), 40 U.S.C. § 270b 2

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Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, J. A. Edwards & Co., Inc. (use plaintiff and appellant below), respectfully prays that a writ of certiorari issue to review the judgment (Appendix A) of the United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court of the United States for the Southern District of New York (DAWSON, *D. J.*).

Opinions Below

The opinion of the District Court is reported in 172 F. Supp. 161 (24a-31a)*. The opinion of the Court of Appeals is not yet reported and is hereto annexed (Appendix B).

* The letter "R" signifies references to the District Court record; the letter "a", references to the Court of Appeals appendices.

Jurisdiction

The judgment of the Court of Appeals was dated and entered December 16, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254.

Question Presented

Whether a letter assigning moneys to a materialman, admittedly sent by a subcontractor to a prime Government contractor, at the materialman's request, within ninety (90) days of the materialman's last delivery to the Government project, when considered in conjunction with the prime contractor's knowledge of (1) the subcontractor's financial difficulties with the unpaid materialman and (2) the materialman's prior deliveries to the job, are sufficient to impose liability upon the prime contractor and its Surety under their Miller Act bond?

Statute Involved

49 Stat. 794 (1935), Title 40, U.S.C., § 270b. "Same; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or im-

plied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

Statement of Case and Dispositions Below

Between September 18, 1956 and October 13, 1956, petitioner, a New York City wholesale distributor of electrical material, sold such material to the defendant Ben B. Greene, Inc. (hereafter referred to as the "subcontractor" or "Greene"), at the agreed price and reasonable value of $7,313.70 (11a). The said material was delivered to a United States Government Nike site, known as "Special AAA Facility, Lewiston, N. Y." (11a). The material was required to be installed on said Government project pursuant to a contract, dated September 26, 1955, made between the defend-

ant, The Thompson Construction Corp. (hereafter referred to as the "prime contractor" or "Thompson"), and the United States Government (11a). Defendant Thompson thereafter and on November 23, 1955, let out the electrical work under the prime contract to the subcontractor Greene, under a subcontract made between Thompson and Greene (Pl. Ex. 1; R. 4). As part of the prime Government contract, the defendants Thompson and Standard Accident Insurance Company (hereafter referred to as the "Surety"), executed and delivered a payment bond under the Miller Act to insure payment of labor and material claims affecting the job. This payment bond was in the penal sum of one-half the prime contract price (Pl. Ex. 1; R. 4).

On August 30, 1957, petitioner commenced an action in the United States District Court, Southern District of New York, to recover the said sum of $7,313.70, in contract, as against the defendant Greene, and, on the Miller Act payment bond, as against the defendants Thompson and the Surety (1a; 3a-5a). Defendant Greene defaulted in answering or appearing (R. 3; 25a). The answer of defendants Thompson and Surety consisted of a general denial and a cross-claim allegedly in favor of Thompson and against Greene under indemnity provisions in the subcontract, i.e., if Thompson were to be adjudged liable to petitioner, that Thompson have judgment over as against Greene (6a-9a).

The case was tried to District Judge Archie O. Dawson, without a jury, on April 7, 1959. Prior to the trial, a pretrial order was made by the said District Judge, based upon the stipulation of the attorneys for the respective parties, which stipulation contained material fact concessions (10a-15a).

The District Judge dismissed petitioner's complaint after trial, as against Thompson and the Surety and awarded judg-

ment in petitioner's favor against Greene for the amount in suit, together with interest (24a-31a).

The dismissal was based upon an admittedly timely, but allegedly insufficient letter (Pl. Ex. 3; 21a), sent by Greene to Thompson, purporting to assign to petitioner moneys then due Greene from Thompson, under their subcontract. This letter was sent at petitioner's request (12a; 19a-20a). Though urged by petitioner to consider other potent factors in conjunction with the letter, the District Judge's determination was based solely thereon. The Court of Appeals considered these other factors but, nevertheless, affirmed (Appendix B).

Soon after Greene commenced work under the electrical subcontract, Thompson knew that Greene was in financial difficulties with his materialmen, including petitioner (16a). Petitioner delivered to the job, electrical material required under the prime Government contract as ordered by Greene (11a).

On September 20, 1956, October 17, 1956 and January 4, 1957, Thompson, ostensibly to insure non-diversion of payments due from Greene to petitioner, made checks payable jointly to Greene and petitioner. These payments were charged to Greene under the subcontract (17a-18a). Thompson followed the same procedure with moneys due other materialmen (16a; Appendix B).

Thompson had direct dealings with petitioner's representatives with respect to the delivery of material to the job (16a-17a).

In December of 1956, Greene completed its work under the electrical subcontract (18a-19a).

Concededly, within 90 days of petitioner's last delivery of material to the job, Greene, at petitioner's request, sent the said letter of January 9, 1957 to Thompson (19a-20a). This

letter, as indicated, purported to assign to petitioner, moneys due Greene under its subcontract, amounting to $7,527.98. Thompson admitted it might have received the letter as early as January 10, 1957 (20a).

On February 8, 1957, Thompson wrote petitioner, assuring petitioner that if it could prove deliveries to the job, payment would be made and Greene's assignment to petitioner recognized (Pl. Ex. 11; R. 22a-23a). In the meantime, and as a direct result of Thompson's receipt of the January 9th letter, Thompson made no further payments to Greene (20a). Thompson admitted that, as of the date of the letter, it owed Greene $3,368.18, although Greene claimed the larger sum of $7,527.98 (20a; Pl. Ex. 3; 21a). As of the date of trial, Thompson admitted that it was still withholding the sum admittedly due and that no payment had been made to Greene (20a). The District Judge advised counsel for Thompson and the Surety that their defense was technical in nature (R. 50).

The Court of Appeals, in affirming the judgment of the District Court, held (Appendix B, p. 23):

> "We therefore think both from the language of the January 8 (sic) letter and also from the attendant circumstances if these are to be considered, that Thompson had no reason to regard the letter as a notice of a claim by Edwards under the Miller Act" (citing *Bowden v. U.S. for the Use of Molloy*, 239 F. 2d 572 (9th Cir., 1956), cert. den. 353 U.S. 957 (1957) and *Old Dominion Iron and Steel Corp. v. Massachusetts Bonding and Insurance Company* 272 F. 2d 73 (3rd Cir., 1959)).

Reasons for Granting the Writ

1. (a) The decision of the Court of Appeals, in effect, absolves a prime contractor on Government projects from making the most superficial kind of inquiry with respect to the

existence of unpaid claims of laborers and materialmen, despite unmistakable knowledge on his part, acquired from writings and otherwise, within 90 days of a materialman's last delivery, of facts sufficient to put him on notice as to the existence of such claims. The prime contractor is therefore virtually absolved from any responsibility whatsoever and assumes no burden, unless there be complete, precise and technical compliance with the provisions of the Miller Act. This does not appear to be the law.

> "It is the essence and purpose of the statute and of the payment bond on a government construction project to protect the materialman and to place the burden on the contractor to make sure that they are paid for the goods which they furnish." (*Moyer* v. *U.S. for Use of Trane Co.*, 206 F. 2d 57 (4th Cir., 1953).)

In the case of *St. Paul Mercury Indemnity Company* v. *U. S.* for Use of *H. C. Jones*, 238 F. 2d 917 (10th Cir., 1956), the Court said:

> "The purpose of the Miller Act is to protect those who furnish labor and material for public construction and to insure that they will be paid for the same. * * * The Act was not designed to protect general contractors."

The amount actually due from the prime contractor Thompson to the subcontractor Greene is clearly irrelevant (*Mankin* v. *U. S.* for use of *Ludowici-Celadon Co.*, 215 U.S. 533 (1910)).

The Miller Act requires the 90-day written notice to the prime contractor to set forth two basic facts: (1) The amount claimed to be due the unpaid materialman "with substantial accuracy" and (2) "the name of the party to whom the material was furnished". The letter of January 9th satisfies both

requirements. It requests Thompson to pay petitioner the sum of $7,527.98. (This represented an overstatement of petitioner's claim to the extent of $214.28, or less than 3%—hardly a cause for complaint on the part of the prime contractor.) This letter further implies, by the clearest kind of implication, that the person to whom the material was furnished is the subcontractor Ben B. Greene. The letter further explicitly refers to the Government project here involved (prime contract number and location—Appendix B, p. 17). Thus, the basic statutory requirements were substantially met. Certainly, the prime contractor was not at liberty to completely disregard the letter, as the Court of Appeals suggests. Indeed, in the case of *U. S.* for the use of *Birmingham Slag Co.* v. *Perry*, 115 F. 2d 724 (5th Cir., 1940) the claimants' 90-day notice was sent directly to the Government engineer, who forwarded a copy to the prime contractor, yet recovery was allowed on the Miller Act bond despite the omission of a direct notice to the prime contractor from the materialman.

The sense of the statute is to impose a burden upon the prime contractor to make further inquiry, once having received a written notice, at least suggesting such inquiry (*Moyer* v. *U. S.* for Use of *Trane Co.*, supra). Indeed, if the January 9th notice were letter perfect, it could not have accomplished any more than it actually did—namely the withholding of the subcontractor's funds by the prime contractor (20a; Pl. Ex. 11; 22a). Certainly, petitioner's rights should not be defeated because the prime contractor Thompson delayed a month in pursuing its inquiry as to the delivery of material to the jobs (20a). Thompson determined, after the expiration of the statutory 90-day period, that petitioner's claim was just and proper (20a) (*U. S.* for the use and benefit of *Hopper Bros. Quarries* v. *Peerless Casualty*

Co., 255 F. 2d 137, 144 (8th Cir., 1958), cert. den. 358 U.S. 831). The Court of Appeals held below (directly contrary to *Hopper*), that "* * * February was too late". It is evident that the prime contractor cannot take advantage of its own delay and thus bar petitioner from recovery under the statute. Additionally, there is no statutory warrant for the Court of Appeals' argument that the 90-day notice in essence must show it "'was intended to be the presentation of a claim,'" (Appendix B, p. 18). In *Hopper* (supra), the materialman's notice to the prime contractor did not state (1) the amount of the claim (although it did state very erroneously the amount of material delivered) and (2) the name of the subcontractor, at whose request, material was delivered. Yet, the Court said, at page 142:

> "Under the circumstances of this case this plaintiff's letter to the contractor of August 6th, 1953, received by the contractor the next day and answered on the day following, must be deemed a giving of written notice by the materialman to the contractor. * * * Although part of plaintiff's letter of August 6th is worded in the form of an interrogatory, it is plain enough from the language used that the writer had turned from the delinquent subcontractor to the contractor to let it know that the writer wanted the money that was owing to it and was giving notice to the contractor to that effect. * * * There is nothing in the record to justify an inference that any defect in form in the plaintiff's notice to the contractor of its unpaid bill, was material to any right of the contractor or of the surety. * * *"

At bar neither the prime contractor nor the surety were either prejudiced or misled by the notice in question.

To the same effect: *McWaters and Bartlett* v. *U. S.* for the use and benefit of *Wilson*, 272 F. 2d 291 (10th Cir., 1959).

(b) Assuming, without conceding, that the January 9th letter, standing alone, is insufficient as a matter of law, nevertheless the said letter, placed in juxtaposition to the uncontradicted facts of which Thompson had knowledge, conclusively established petitioner's Miller Act case against defendants Thompson and the Surety. Thus, the letter, read in conjunction with Thompson's knowledge: (1) That petitioner had delivered electrical material to the project here involved prior to the date of the letter (16a); (2) of Greene's financial difficulties with its materialmen (16a-18a); and (3) that petitioner was pressing Greene for payment for materials supplied (17a-18a), was more than sufficient to impose Miller Act liability upon Thompson and the Surety. To put it differently, the letter must and should be considered in conjunction with other uncontradicted evidence, in order to properly evaluate petitioner's rights under the Miller Act bond. In the case of *Houston Fire & Casualty Insurance Company* v. *United States* for the use and benefit of *Trane Company*, 217 F. 2d 727 (5th Cir., 1954), the Court of Appeals said:

> "It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears, the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with."

2. The holdings of the Court of Appeals and the District Judge below are in direct and irreconcilable conflict with many cases, on weaker facts, construing the Miller Act liberally in favor of unpaid materialmen and laborers. (*U. S.* for use and benefit of *Hopper Bros. Quarries* v. *Peerless Casualty Co.*, supra; *Standard Accident Insurance Company* v.

U. S. for the use and benefit of *Powell*, 302 U.S. 442 (1938); *Brogan* v. *National Surety Co.*, 246 U.S. 257 (1918); *Illinois Surety Co.* v. *John Davis Co.*, 244 U.S. 376 (1917)). That such conflict exists may be inferred from the following language contained in the opinion of the Court of Appeals below:

> "The other cases principally relied upon by plaintiff, United States for use of Birmingham Slag Co. v. Perry, 115 F. 2d 724 (5th Cir. 1940), Coffee v. United States for use of Gordon, 157 F. 2d 968 (5th Cir., 1946), and Houston Fire and Casualty Co. v. United States for use of Trane Co., 217 F. 2d 727 (5th Cir. 1954), followed the Hallenback decision in dispensing with formalities as to the manner of giving notice. * * * On the other side, Bowden v. United States for the use of Malloy, 239 F. 2d 572 (9th Cir. 1956), cert. denied 353 U.S. 957 (1957) ruling in favor of the contractor and surety, is closer to the instant case. * * *"

The *Bowden* case is clearly distinguishable from the case at bar for the simple reason that the unpaid materialman in that case had no knowledge that the 90-day written notice was being presented on his behalf to the prime contractor. Here, the letter of January 9th was sent with the prior knowledge, approval and at the request of the petitioner. Indeed, it was mailed by the petitioner to the prime contractor (19a-20a). As an assignment it asserted a direct claim against the prime contractor. *Sillman* v. *Twentieth Century Fox Film Corporation*, 3 N. Y. 2d 395 (1957). Significantly, nowhere does the Court of Appeals below make reference to the basic fact that the letter of January 9th impelled the prime contractor to withhold moneys due the subcontractor Greene (20a). It is idle to speculate, as the Court of Appeals did, as to what Thompson might have felt or thought, when we know from Thompson's testimony, what it actually did (16a; 18a; 20a).

3. The net effect of the decision below and the decision in the companion case of *U. S. A. for the use and benefit of J. A. Edwards & Co., Inc.* v. *Peter Reiss Construction Co., Inc.*, —— F. 2d —— (2d Cir., 1959) (Writ applied for simultaneously), is to whittle away rights unmistakably conferred upon unpaid materialmen and laborers to collect their just claims under Miller Act bonds. The Congressional intent has thus been nullified by a number of lower court decisions, apparently in conflict with each other, and also contradictory of the principles enunciated by the Supreme Court liberally construing the Miller Act. This conflict should be resolved by the Supreme Court as it seriously and adversely affects Government construction and the prosecution of claims under the Miller Act. The statute has been rendered a trap for the unwary. It has been shorn of its real meaning to the serious detriment of claimants for whose benefit the Act was passed.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Court of Appeals in this case.

Dated: March 3, 1960.

Respectfully submitted.

IRVING LEVINE,
Counsel for Petitioner,
501 Fifth Avenue,
New York 17, N. Y.

APPENDIX A

Judgment Below

UNITED STATES COURT OF APPEALS

for the Second Circuit

At a Stated Term of the Untied States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December, one thousand nine hundred and fifty nine.

Present:

Hon. Harold R. Medina,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly, *Circuit Judges.*

United States of America for the use and benefit of
J. A. Edwards & Co., Inc.,
Plaintiff-Appellant,

against

The Thompson Construction Corp. and
Standard Accident Insurance Company,
Defendants-Appellees,

and

Ben B. Greene, Inc.,
Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, wtih costs to the appellees.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 72—October Term, 1959.

(Argued November 20, 1959 Decided December 16, 1959.)
Docket No. 25667.

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,
Plaintiff-Appellant.

against

THE THOMPSON CONSTRUCTION CORP. and
STANDARD ACCIDENT INSURANCE COMPANY,
Defendants-Appellees.

and

BEN B. GREENE, INC.,
Defendant.

Before:

MEDINA, MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, Judge, 173 F. Supp. 161 (sic), dismissing an action by use of plaintiff under the Miller Act to recover for material furnished to a government project, against the contractor and its surety. Affirmed.

IRVING LEVINE, New York, New York, for Plaintiff-Appellant.

CARL E. BUCKLEY, New York, New York (Nevius, Jarvis & Pilz, New York, New York, on the brief), for Defendants-Appellees.

FRIENDLY, *Circuit Judge*:

We must determine on this appeal whether sufficient notice was given defendant The Thompson Construction Corp. to entitle the use plaintiff, J. A. Edwards & Co., Inc., which furnished materials to a subcontractor, Ben B. Greene, Inc., to recover from Thompson and its surety under the bonds furnished by the latter pursuant to the Miller Act, 40 U.S.C. § 270a(2) and b(). Judge Dawson, in a reasoned opinion, held the notice did not meet the requirement of the statute. We agree.

In 1955 the United States entered into a contract with Thompson for the construction of a Nike site at Lewiston, N. Y. Pursuant to the Miller Act, 40 U.S.C. § 270a(2), Thompson executed a standard government payment bond to the United States wherein Thompson was the principal and Standard Accident Insurance Company was the surety, "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person." Thompson employed a subcontractor, Ben B. Greene, Inc., for the performance of certain electrical work. Greene in turn requested Edwards to furnish electrical materials and supplies for use in Greene's subcontract. The Lewiston project was by no means the only Nike project where Greene did this. We have another such case in United States for the use of J. A. Edwards & Co. v. Peter Reiss Construction Co., decided this day. United States for the use of J. A. Edwards & Co. v. Bregman Construction Corp., 172 F. Supp. 517 (E.D.N.Y. 1959) is still another.

In the claim dismissed by the District Court, Edwards sought to recover from Thompson and its surety a balance of $7,313.70 due for deliveries of material between September 19 and October 13, 1956. Edwards did not contend it had any contractual relationship with Thompson. It relied rather on the proviso in § 270b(a) of the Miller Act, 40 U.S.C.

§ 270(a), which we quote in the margin.[1] It claims that the statutory requirement of notice was satisfied by a letter dated January 9, 1957 sent by Greene to Thompson at Edwards' instance which we quote below,[2] at least when the letter is taken in conjunction with other facts.

Judge Dawson held the letter did not meet the statutory requirements because "the prime contractor, upon receipt of the notice from the subcontractor, was in no position to know that it had emanated from the materialman," because the letter did not set forth with substantial accuracy the amount claimed by Edwards, because the letter did not state it was related to material supplied for the subject contract, and because the letter afforded no indication that it was to be

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[1] The relevant language of the statute is:
"Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

Ben B. Greene, Inc.
Licensed Electrical Contractor
40-18 Astoria Boulveard S Long Island City 3, N. Y.
RAvenswood 8-7501-2

January 9, 1957

Thompson Construction Corp.
11 North Pearl Street
Albany 7, New York

Re: DA 30-075 ENG 6940
Lewiston, N. Y.

Gentlemen:
According to our records, on the above captioned job, there is a bal-

interpreted as a notice under the Miller Act. Accordingly he directed that the action be dismissed as against the contractor and the surety but awarded judgment against the subcontractor Greene, who had defaulted in the action.

The reason why the Miller Act conditions the rights of a person having "no contractual relationship express or implied with the contractor furnishing said payment bond" upon the giving of proper notice within ninety days from the date "on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made," is readily understandable. It was assumed that such third parties will first endeavor to collect from the subcontractor with whom they have a contract relation. During a reasonable period, while these efforts are going forward, the contractor withholds the payments due the subcontract. If he receives a third party claim within ninety days, he reserves appropriate amounts from monies otherwise owing to the subcontractor. But, once ninety days have elapsed without such notice, he is free to

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ance due of $2700.10, plus the approximate sum of $4,827.88, representing change orders, to date, making a total due us of $7,527.98.

Subject to your approval, this letter may serve as your authority to make all payments now or hereafter due us under the above contract to:

J. A. Edwards & Co., Inc., for Ben B. Greene, Inc.
206 East 29th Street
New York, New York

Please charge all such payments to our account under the above contract.

We thank you for any cooperation you may extend.

Very truly yours,

BEN B. GREENE, INC.
By /s/ Ben B. Greene
Ben B. Greene, President

Bbg;bg

No question was raised as to the timeliness of the notice with respect to all deliveries between September 19 and October 13, 1956, if it was sufficient in tenor.

pay the subcontractor for the latter's work without risk of liability under his bond to laborers and materialmen whose sole contractual relation is with the subcontractor. A statute which gave rights on the contractor's bond to laborers and materialmen having no contractual relations with him but which did not require timely and adequate notice to him, would lead either to double payments or to interminable delay in settlements between contractors and subcontractors to guard against these,—in either case with attendant prejudice to all concerned.

The notice which the Miller Act requires is one meeting this basic purpose. Its essence is, as said in United States v. Fraser Construction Co., 87 F. Supp. 1, 5 (W.D. Ark. 1949), that it must show it "was intended to be the presentation of a claim," a claim against the contractor and its surety by the laborer or materialman in the latter's own right. In addition, it must state "with substantial accuracy" the amount claimed to be owing the laborer or materialman on the project and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. If it meets these simple and basic requirements, no degree of formality is needed. But meet them it must, for otherwise the purpose of the notice requirement would be frustrated. And while the United States has an interest in the payment of all persons furnishing labor and materials to government projects, it also has an interest in the prompt settlement of accounts between contractors and subcontractor and in avoiding undue and preventable losses to contractors and their sureties—costs which in the long run the public pays.

The letter of January 9, 1957 did not measure up to this test. The letter was a request by Greene that Thompson consent to Greene's assigning to Edwards monies payable to Greene by Thompson under the subcontract the relevant para-

graph of which is quoted below[3]—that and nothing more. It was signed by Greene, the subcontractor, not by Edwards, the materialman. It in no way indicated that Edwards was making any direct claim against Thompson and Thompson's surety for materials furnished on the Lewiston project or that Greene was making any such claim on Edwards' behalf. The letter refers only to amounts owing by Thompson to Greene; it says nothing about amounts owed by anyone to Edwards and certainly nothing about amounts owed by Greene to Edwards for materials supplied by Edwards on the Lewiston job, the only item for which the Miller Act gave Edwards a claim against Thompson and the surety. To be sure, Thompson would hardly have thought Greene was making Edwards a present of Greene's claim against Thompson; but it could perfectly well have thought that Edwards had been fully paid for materials on the Lewiston project and that the assignment related to other Greene-Edwards transactions. It is of no consequence that the balance of $7,527.98, which was then thought to be the amount owing to Greene from Thompson, approximates the amount of $7,313.70 now claimed by Edwards against Greene for materials at Lewiston. So far as appears, this is pure coincidence. In any event, there was nothing in the letter to show, as the Act requires, how much Edwards claimed to be due it from Greene for materials furnished to the particular work. The facts, made much of by plaintiff, that the letter was signed by Greene at plaintiff's instance and that plaintiff's vice-president put it in the mail, are equally irrelevant. For while we assume that Thompson did not suppose the letter was spontaneous

[3] "27. Neither this Subcontract nor any interest therein (including moneys payable thereunder) shall be assigned or transferred, nor shall it be sublet, without the prior written approval of the Contractor and any such attempted assignments, transfer or subletting without the prior written approval of the Contractor shall be of no force and effect, and shall entitle the Contractor, if it so elects, to treat the same as a violation of an essential term of this Subcontract."

with Greene, nothing on its face gave Thompson any reason to think that a direct claim against Thompson and the surety was being asserted on Edwards' behalf for Lewiston materials. Yet such a "presentation of a claim" is what the Act requires.

Edwards contends that even if the letter of January 9, 1957 was not adequate in and of itself, other facts made it so. It says in its brief (p. 12) that "In the factual setting here presented, it would require the exercise of very little imagination on the part of the general contractor Thompson to tie in the letter with the furnishing of electrical material by the use plaintiff under the prime Government contract." We think the need for exercising imagination was what the notice provision of the Miller Act was intended to prevent. However, assuming arguendo that a writing relied on as the required notice may be supplemented by extrinsic facts, these do not improve Edwards' case.

The first facts relied on are discussions between Edwards and Thompson in the summer of 1956 concerning the late delivery of certain materials that Edwards was supplying. While these show that Thompson knew Edwards was furnishing some electrical materials to the project, there is nothing in this episode that would clearly have led Thompson to interpret Greene's request, six months later, for permission to assign Greene's claim to Edwards as the presentation of a claim by Edwards for materials furnished to the project.

The next episode is that in September, 1956, Greene telephoned Mr. Thompson, president of the defendant contractor, "to see when he (Greene) was going to get paid and he asked, as soon as the payment came in from the Government, that we would make out a check in that amount and send it to Edwards because he owed you that amount." Mr. Thompson said also that thereafter "Greene got paid every month, so that each time a payment was due to him he would

call up and go through the same procedure. I think the next conversation on the subject would be one month later, approximately." Edwards claims this should have put Thompson on notice that Greene was in financial difficulties with Edwards. Probably so, but there was nothing in this to show that the amounts that Greene asked Thompson to remit to Edwards were for material furnished by Edwards to the Lewiston project as distinguished from others, that Edwards meant to assert any direct claim against Thompson and its surety on the Miller Act bond as distinguished from working out its problems by receiving monies due from Thompson to Greene, or that the monies so received by Edwards did not constitute full payment. Indeed, as we shall see, Thompson's letter of February 8, 1957, shows that it thought precisely that.

When we move on to January, 1957, the evidence not only is not helpful but becomes decidedly damaging to Edwards. Plaintiff's counsel read into the record still another excerpt from Mr. Thompson's deposition in which the latter stated how he reacted to the January 9 letter from Greene. He testified: "At the time he (Greene) wrote that letter there was no indication to me that he owed Edwards on our job. It looked to me as though he was in financial difficulties, but not necessarily as far as we were concerned, because we had paid Edwards previously and to the best of our knowledge had settled the entire thing." And, in answer to a question "Isn't that a letter requesting money?", Thompson answered "Yes, but not necessarily for material. This is a statement of what Greene thought they had coming on the contract. It may be for labor or material or for anything." Even Edwards' vice-president, Blackledge, in his testimony characterized the January 7 letter as being one "which would be in effect an assignment of the account to us to protect our $7,700, approximately, that he still owed us on that job."

The final piece of evidence relied on is a letter from Thompson to Edwards dated February 8, 1957, quoted below.[4] The letter on its face harms Edwards severely. For it affords contemporaneous confirmation to Mr. Thompson's later testimony that he construed the January 9 letter as merely re-

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The Thompson Construction Corp.
Engineers and Contractors
11 North Pearl Street
Albany 7, N. Y.

February 8, 1957.

J. A. Edwards & Co., Inc.
206 East 29th Street
New York, New York
Attention: Mr. Blackledge

Re: Contract No. DA-30-075-eng-6940
AAA Facilities, Lewiston, N. Y.

Gentlemen:

We are enclosing a copy of a letter dated January 9, 1957 sent by Ben B. Greene, Inc. to us. We do not, at the present time know with definite certainty the amount we owe Greene as there are several unsettled change orders. If all the unsettled change orders are acceptable at Greene's figures, then the total amount owing would be in the neighborhood of $4,500.00.

Please be advised that we will recognize the assignment to you in so far as we are permitted by law to do so. Before making any payments to you, we will want definite assurance from you, as well as delivery receipts, proving that the merchandise for which we may pay was delivered to the above job.

We are rather disturbed about this account as it was our definite understanding that when payment of $6,946.00 was made to you by us on or about January 4, 1957, that this constituted final payment. It is rather surprising to us that since this job was finished around that time that there should be further billings for material delivered. We are wondering if the material in question was delivered prior to or after January 4th.

Yours very truly,

The Thompson Construction Co.
/s/ John S. Thompson
John S. Thompson

JST:es
Copy: Ben B. Greene, Inc.

questing recognition of an assignment, to which Thompson agreed on February 8, "in so far as we are permitted by law," and not at all as a Miller Act notice. The February 8 letter makes it plain that Thompson considered the only obligation arising on it out of the two letters was to pay Edwards whatever was finally determined to be owing by Thompson to Greene, whether this was more or less than the amount owing to Edwards for materials furnished at Lewiston, a subject as to which Thompson had been given no notice and as to which it therefore had no concern. If evidence to fortify this interpretation of the February 8 letter were needed, the record provides this. Thompson testified that the February 8 letter was prompted by a telephone call on February 7 from Blackledge who "wanted to know how much money we owed Greene," that Blackledge mentioned that "Greene owed him about $50,000," and that Thompson said "What has that to do with us, and how much of that is ours?" to which Blackledge responded that "he didn't have the records and he did not know." Thompson also testified that Blackledge's call was "to see how much money was due Greene on his contract and whether we would confirm an assignment of that money to Edwards." It is immaterial whether Edwards informed Thompson thereafter how much of Greene's debt was on the Lewiston job. For February was too late.

We therefore think both from the language of the January 8 letter and also from the attendant circumstances if these are to be considered, that Thompson had no reason to regard the letter as a notice of a claim by Edwards under the Miller Act. If others who had furnished materials to Greene had served notices under the Miller Act, Thompson would have been justified in setting aside monies otherwise due to Greene; and it is immaterial in determining the sufficiency of the January 9 letter as a notice that in this case no Miller Act notices from other materialmen appear to have

been served. In fact, however, this record does illustrate the importance of the materialman's sending a notice that properly informs a contractor of his claim. On March 19, 1957, Thompson was served with a Federal tax lien relating to Greene. It has been held that if Thompson had been properly apprised of Edwards' claim, monies required to satisfy it would not be subject to a tax lien against Edwards, Steelcraft Manufacturing Co. v. Hewkin, 148 F. Supp. 872 (E.D. Ill. 1956); United States Fidelity and Guaranty Co. v. Miller, 143 F. Supp. 941 (W.D.N.C. 1956

While each case as to the sufficiency of notice under the Miller Act necessarily turns on its own facts, the authorities support the view that the notice here was inadequate.

Both sides derive comfort from the leading case of Fleisher Engineering & Const. Co. v. United States for the use of Hallenbeck, 311 U.S. 15 (1940). Plaintiff relies upon the Court's statement that the Miller Act should be given "a reasonable construction in order to effect its remedial purpose" and upon the allowance of recovery although the notice received by the contractor had been sent not by registered, but only by ordinary mail. Defendant finds solace, we think with greater reason, in the statement, buttressed by a reference to earlier decisions under the Heard Act, "that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue," namely, the content of the notice, which in the Hallenbeck case was "fully met," and "the provision as to the manner of serving notice," the purpose of which the Court regarded as being simply "to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received."

The other cases principally relied upon by plaintiff, United

States for use of Birmingham Slag Co. v. Perry, 115 F. 2d 724 (5th Cir. 1940), Coffee v. United States for use of Gordon, 157 F. 2d 968 (5th Cir. 1946), and Houston Fire and Casualty Co. v. United States for use of Trane Co., 217 F. 2d 727 (5th Cir. 1954), followed the Hallenbeck decision in dispensing with formalities as to the manner of giving notice. However, in none was there any doubt that the contractor had been fully apprised by the use plaintiff that the letter asserted a direct claim in a specified amount. On the other side, Bowden v. United States for the use of Malloy, 239 F. 2d 572 (9th Cir. 1956), cert. denied 353 U.S. 957 (1957) ruling in favor of the contractor and surety, is closer to the instant case. There the subcontractor authorized the contractor to issue checks payable jointly to itself and various materialmen including Malloy and to charge these amounts against funds due the subcontractor in connection with work on the project. The Ninth Circuit held this insufficient since, among other requirements, "the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill." 329 F. 2d at 577. Plaintiff seeks to distinguish Bowden on the ground that Malloy had not known of the subcontractor's action. But this was an alternative ground of decision and, as indicated above, we do not regard Edwards' participation in Greene's January 9, 1957 letter as legally significant when nothing on the face of the letter or otherwise indicated that Edwards was making a direct claim. The Third Circuit has recently followed Bowden in United States for the use of Old Dominion Iron and Steel Corp. v. Massachusetts Bonding and Insurance Company, decided November 20, 1959. We join with it in endorsing the statement in Bowden, 259 F. 2d at 578:

> "A brief letter from the supplier to the prime contractor will make certain and unambiguous the rights

and liabilities of all concerned—the supplier, the prime contractor, and the surety. W do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond."

We agree with Judge Dawson that no such letter was written here.

Judgment affirmed.

Proof of Service

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of March, 1960, I served three (3) copies of the foregoing petition for a writ of certiorari on the Respondents, The Thompson Construction Corp. and Standard Accident Insurance Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorneys of record as follows: Nevius, Jarvis & Pilz, Esqs., 115 Broadway, New York 6, N. Y.

IRVING LEVINE,
Counsel for Petitioner,
501 Fifth Avenue,
New York 17, N. Y.

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Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

Petitioner,

—against—

THE THOMPSON CONSTRUCTION CORP. and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents,

and

BEN B. GREENE, INC.,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

JOSEPH EDWARD DAVEY, JR.
Counsel for Respondents
115 Broadway
New York, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

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BRIEF OF RESPONDENTS IN OPPOSITION

Reasons for Denying the Writ

I.

This Court clearly held in the case of *Fleisher Engineering & Construction Company,* et al. v. *United States of America for the Use and Benefit of George S. Hallenbeck,* etc., 311 US 15 (1940), that notice under Section 270 (b) of Title 40, U.S. Code, was a condition precedent to the right of one not in privity

with the general contractor to sue on the Miller Act bond. This Court further pointed out that "compliance with the prescribed limitation was essential to the assertion of the right conferred".

To the same effect was the case of *Bowden* v. *United States of America for the use of Emmet J. Molloy*, 239 F. 2d 572 (9th Cir. 1956), Cert. Den. 353 U.S. 957 (1957), wherein the facts were most similar to the facts in the case at bar. The plaintiff therein was also a supplier of a subcontractor to the general contractor and the purported Miller Act notice relied upon was a letter from the subcontractor to the general contractor in which it was stated that the plaintiff-supplier was owed a sum of money greater than the amount eventually sued for by the plaintiff. The United States Court of Appeals there held that this was not proper notice, primarily because the notice came from the subcontractor and not from the supplier. The Court's holding was based on the principle that liberal construction of a remedial statute does not justify reading out of the statute the very construction that Congress and the precise wording of the statute itself clearly requires as a condition precedent to a right of action on the Miller Act bond. The *Bowden* case, supra, has been followed in the United States Court of Appeals for the Third Circuit in *United States for the Use of Old Dominion Iron & Steel Corp.* v. *Massachusetts Bonding and Insurance Company*, 272 F. 2d 73.

The purported Miller Act notice in the case at bar (21a) is also a letter from the subcontractor (Ben B. Greene, Inc.), and not from the petitioner, to the general contractor (The Thompson Construction Corp.).

Thus it would seem that the *Bowden* case, supra, and the *Old Dominion Iron & Steel Corp.* case, supra, are controlling.

Nor is there any merit in the petitioner's argument that the purported letter notice was signed by Greene at petitioner's request since nothing in that letter gave respondent, The Thompson Construction Corp. any reason to think that a direct claim was being made against it on the Miller Act bond. That Congress intended the interpretation of the Miller Act as stated in the *Bowden* case, supra, the *Old Dominion Iron & Steel Corp.* case, supra, as well as the decision in the instant case in the Courts below, is evident from H. Rep. Report No. 1263 and Senate Report No. 1238 (74th Congress, First Session).

II.

In the case of *United States, for Use of Bruce Co., Inc.* v. *Fraser Construction Co.*, et al., 87 F. Supp. 1 (W. D. Ark. 1949) it was held that the Miller Act notice must amount to a "presentation of a claim" and the form and manner of presentation must be such as to so advise the contractor furnishing the bond, and this holding is completely consistent with the holding in the *Fleisher* case, supra. In the case at bar, the basic statutory requirement of the presentation of a claim, was not met by the letter of January 9, 1957 (21a).

In its petition the petitioner erroneously states that the purported letter notice (21a) was an assignment. However, a reading of this purported statutory notice

clearly indicates that it was a mere *request* by Greene for *approval* of an assignment of moneys allegedly due Greene from The Thompson Construction Corp. on this general contract. It is also apparent from reading the said purported notice that the amount of money in the first paragraph of said letter in no way has any relation to the amount sued for, but it is a mere coincidence that the amount is approximately the same as the amount in issue. Incidentally Paragraph 27 of the subcontract between Ben B. Greene Inc. and The Thompson Construction Corp. (Exhibit 2) states in no uncertain terms that any attempted assignment without the written approval of Thompson is invalid. Therefore, since the letter is not an assignment, the case of *Sillman* v. *Twentieth Century Fox Film Corporation*, 3 N. Y. 2d 395 (1957) cited by the petitioner is inapplicable. Thus petitioner's statement on page 11 of its petition that said letter "impelled contractor to withhold money," is erroneous. Furthermore, petitioner's statement on page 6 of the petition that no further payments were made to Greene as a direct result of the January 9, 1957, letter has no basis whatsoever in the record.

The respondents are compelled to point out that the petitioner on page 5 of its petition erroneously states that respondent, The Thompson Construction Corp. knew that Greene was in financial difficulty with his materialmen. However, the record is clear that this alleged knowledge was merely because of a check jointly payable to Greene and another electrical supplier (16a). The petitioner then goes on to state on page 5 of its petition that the ~~check~~s payable jointly to Greene and the petitioner were to prevent diversion of payments by Greene. This erroneous conclusion

is completely refuted by the testimony that said payment arrangement was made solely at the request of Greene. (17a)

III.

The respondents do not dispute that the Miller Act is a remedial statute and should be liberally construed and so petitioner's cases cited for this contention are inapposite. In the cases of *Moyer*, et al., v. *United States for the Use of Trane Co.*, et al., 206 F. 2d 57 (4th Cir., 1953), *United States for Use of Birmingham Slag Co.* v. *Perry*, et al., 115 F. 2d 724 (5th Cir., 1940), *Standard Accident Insurance Company*, v. *U. S. for the Use and Benefit of Powell*, 302 U. S. 442 (1938), *Brogan* v. *National Surety Co.*, 246 U. S. 257 (1918), *Illinois Surety Company* v. *John Davis Co.*, 244 U. S. 376 (1917), do not involve the question of notice at all, which is the very issue in the case at bar. *Houston Fire & Casualty Insurance Co.* v. *United States for the Use and Benefit of the Trane Co.*, 217 F. 2d 727 (5th Cir. 1954), *United States of America, for the Use and Benefit of Hopper Bros. Quarries* v. *Peerless Casualty Company, et al.*, 255 F. 2d 137 (8th Cir. 1958) and *McWaters and Bartlett, et al.* v. *United States of America, for the use and benefit of Wilson*, 272 F. 2d 291 (10th Cir. 1959) do not support petitioner's argument in any way since in those cases the "nature and state of the indebtedness" was made known to the general contractor. A case more in point with the instant case is *United States for the Use and Benefit of American Radiator & Standard Sanitary Corporation* v.

Northwestern Engineering Co., et al., 122 F. 2d 600 (8th Cir. 1941), where the Court held that notice from the supplier itself was a condition precedent to the existence of a right of action on the bond.

Research has failed to disclose any case under the Miller Act requiring the exercise of imagination or the necessity for further inquiry on the part of a general contractor, as suggested by the petitioner. From the *Fleisher* case, supra, as well as the wording of the statute itself, it would seem that this is exactly what the statute was attempting to avoid.

Inasmuch as the case of *United States of America for the Use and Benefit of J. A. Edwards & Co., Inc.* v. *Peter Reiss Construction Co. Inc. et al.*, — F. 2d — (2nd Cir. 1959) (writ of certiorari applied for) does not involve the question of the quality of the Miller Act notice, but only the timeliness thereof, the attempt to join that case with the within case is improper. Finally, to characterize the Miller Act as a "trap for the unwary" because of the decision below, is hardly consonant with the facts when, as indicated in the *Bowden* and *Old Dominion Iron & Steel Corp.* cases, supra, a mere written notice from the petitioner to the general contractor simply stating that a subcontractor, Ben B. Greene, Inc., of the general contractor owed petitioner moneys in connection with the general contractor's project would be sufficient.

Conclusion

Inasmuch as the decision below neither conflicts with decisions of this Court nor with the decisions of the United States Courts of Appeals for other circuits, as well as for the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH EDWARD DAVEY, JR.
Counsel for Respondents
115 Broadway
New York, New York

CARL E. BUCKLEY
Of Counsel

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

Petitioner,

against

THE THOMPSON CONSTRUCTION CORP. and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents,

and

BEN B. GREENE, INC.,

Defendant.

PETITIONER'S REPLY BRIEF

IRVING LEVINE,
Counsel for Petitioner,
No. 501 Fifth Avenue,
New York 17, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 774

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,

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BEN B. GREENE, INC.,

Defendant.

PETITIONER'S REPLY BRIEF

I.

The bare issue here is whether the subcontractor's letter of January 9, 1957 (19a-20a) addressed to and received by the prime contractor Thompson (20a; 22a-23a) and sent at petitioner's request (19a), when considered in conjunction with (1) Thompson's knowledge of its subcontractor's financial difficulties on the job (16a-18a) and (2) petitioner's delivery of material to said job (17a), are sufficient to render Thompson and the Surety liable on their Miller Act Bond. The issue at bar is strictly one of law, since the facts are not in dispute (10a-15a).

Respondents' reliance upon the *Bowden* and *Old Dominion* cases (Respondents' Brief, pp. 2, 3) is misplaced. These cases are readily distinguishable from the case at bar.

In *Bowden* (239 F. 2d 572—9th Cir. 1956, Cert. Den. 353 U.S. 957), which respondents assert is "most similar", the Court of Appeals there said:

> "The writing must be sent or presented to the prime contractor by or on the authority of the supplier."

At bar, the letter of January 9th was sent "on the authority of the supplier". In *Bowden*, too, the materialman had no knowledge that a claim was being presented to the prime contractor by the subcontractor, on the materialman's behalf.

In the *Old Dominion* case (CCA 3rd, 1959, 272 F. 2d 73), the supplier was similarly unaware of the presentation of a claim on his behalf to the prime contractor by the subcontractor. The Court of Appeals there held, in reversing a judgment for the supplier:

> "* * * we find that the plaintiff here did nothing to secure the protection and benefits afforded him by the Act." (The uncontradicted proof shows that petitioner at bar intended the letter of January 9th as the presentation of a claim to the prime contractor (19a).)

Additionally, it should be observed that in the *Bowden* and *Old Dominion* cases, there were not presented two factors urged upon the Courts below: (1) Thompson's knowledge of his subcontractor's financial insecurity and (2) Thompson's knowledge of petitioner's deliveries of material to the job. Nevertheless, if we accept respondents' argument at face value that the *Bowden* and *Old Dominion* cases are controlling authorities against the petitioner, then it must be concluded that a serious conflict exists between the Court of Appeals in the Second Circuit and the Court of Appeals in different circuits holding to the contrary (infra).

II.

In construing a remedial statute, such as the Miller Act, it is respectfully submitted that the required statutory 90-day notice is valid so long as it substantially complies with the statute (see cases cited, pp. 7-11, Petition).

Respondents take issue with petitioner's characterization of the January 9th letter (21a) as an assignment to petitioner of moneys due from Thompson to the subcontractor Greene (Respondents' Brief, pp. 3, 4). If the letter be deemed a conditional assignment to petitioner of moneys due Greene, that is, conditional in the sense that Thompson's approval was necessary to impart validity, yet uncontradicted facts demonstrate that notwithstanding any right in Thompson to reject this assignment, Thompson did not exercise such right. Indeed, Thompson recognized said assignment seeking from the petitioner, however, proof of moneys due on the Government job here involved (14a-15a). ~~This conduct, on the Government job here involved (14a-15a).~~ This conduct, on the part of Thompson, constituted an effective waiver of the provision in its subcontract with Greene prohibiting assignments, etc. (see *Sillman* v. *20th Century Fox Film Corporation*, 3 N.Y. 2d 395, 403, and cases therein cited). The question may then be put—If a 90-day Miller Act notice specifies the amount claimed to be due the supplier, with substantial accuracy and the name of the subcontractor to whom the material was supplied, is the notice thereby rendered invalid if, additionally, it also purports to assign moneys to the supplier? The answer should be in the ~~affirmative~~ negative, contrary to the holding below. Otherwise, a prime contractor on a Government project would be virtually absolved from making any kind of inquiry or assuming any burden as, indeed, the Court below held.

III.

Lower courts should not be alert to strike down Miller Act claims at the slightest provocation. This is not the sense of the Statute. At bar, as in the companion *Reiss* case, the materialmen have been denied recovery although there is no question that deliveries were in fact made to the government projects, which remain unpaid. The petitioner, therefore, has been turned out of court on a highly technical construction of a remedial statute. It is difficult, if not impossible to reconcile the authorities in the *Bowden* and *Old Dominion* cases and the holding, at bar, with such cases as: *Moyer* v. *U.S.* for use of *Trane Co.* (206 F. 2d 57 (4th Cir., 1953)); *Birmingham Slag Co.* v. *Perry* (115 F. 2d 724 (5th Cir. 1940)); *Hopper Bros. Quarries* v. *Peerless Casualty Co.* (255 F. 2d 137, 144 (8th Cir., 1958), cert. den. 358 U.S. 831); *McWaters Bartlett et al.* v. *U.S.A.* for the use and benefit of *Wilson* (272 F. 2d 291 (10th Cir., 1959)) and *Houston Fire & Casualty Insurance Co.* for the use and benefit of the *Trane Co.* (217 F. 2d 927 (5th Cir., 1954)).

An irreconcilable conflict exists which, it is respectfully submitted, should be corrected by the Supreme Court.

The questions involved at bar are of considerable importance. They certainly affect, in one way or another, all government construction. A writ should therefore issue as prayed for in the Petition.

Dated: April 8, 1960.

Respectfully submitted,

IRVING LEVINE,
Counsel for Petitioner,
501 Fifth Avenue,
New York 17, N. Y.

Proof of Service.

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of April, 1960, I served three (3) copies of the foregoing Petitioner's Reply Brief on the Respondents, The Thompson Construction Corp. and Standard Accident Insurance Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorney of record, Joseph Edward Davey, Jr., Esq., 115 Broadway, New York, N. Y.

IRVING LEVINE,
Counsel for Petitioner,
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New York 17, N. Y.